

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

17 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3500

MAR 09 2010

REPLY TO THE ATTENTION OF:

R-19J

Thomas W. Easterly, P.E., DEE, QEP
Commissioner
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46204-2251

Dear Mr. Easterly:

I want to alert you to the United States Environmental Protection Agency's concerns with Indiana's National Pollutant Discharge Elimination System (NPDES) general permit rule program. As you know, this program provides that the Indiana Water Pollution Control Board (the Board) issues general permits as administrative rules. It has come to our attention that Indiana amended Ind. Code § 13-18-1-2 (a) (2) (B) in 1998 to provide, among other things, that one member of the Board must be employed by an entity holding a major NPDES permit. As explained below, this statutory provision contravenes the requirements for state NPDES permits programs in the Clean Water Act (CWA) and its implementing regulations. Separately, EPA understands that the general permits issued by the Board contain no expiration date, in contrast to the fixed term of 5 years contemplated by the CWA and regulations.

I. Conflict of Interest

The Indiana statute conflicts with EPA regulations governing state NPDES programs at 40 CFR §123.25(c), which provides:

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

EPA promulgated this regulation consistent with nearly identical language at CWA Section 304(i)(2)(D), 33 U.S.C. § 1314(i)(2)(D). Under the CWA and its implementing regulations, an NPDES permit cannot be issued by a board a member of which is employed by an entity holding an NPDES permit, as mandated by Ind. Code § 13-18-1-2 (a) (2) (B).

The State provision creating this conflict was added after EPA approved Indiana's general permit program in 1991. Indiana has not submitted the provision to EPA for approval. Under 40 CFR § 123.62, a revision to a State NPDES program, such as that prompted by the amended Indiana statute, becomes effective for the purpose of the CWA only after EPA has approved, and EPA can approve only when the revision meets the requirements of the Act and regulations.

II. Lack of an Expiration Date

The lack of an expiration date in the general permits issued by that Board presents an additional concern since CWA Section 402(b)(1), 33 U.S.C. §1342(b)(1), and 40 CFR § 122.46 provide that permits shall be issued for a fixed term not exceeding 5 years. (327 Ind. Adm. Code r. 5-2-6 similarly provides that Indiana NPDES permits shall be issued for a term not to exceed five years.) The Act and regulations require permit renewal so that the permit-issuing authority can apply new technologies and water quality standards to point source discharges. The renewal process allows the public and EPA to comment on the choices that the permit authority makes in the course of drafting a new permit. At present, the public and EPA are denied these rights with respect to Indiana's general permits. Inadequate public participation in the Indiana general permit program was one of the issues raised in a December 17, 2009, petition in which three citizens groups asked EPA to withdraw our approval of Indiana's NPDES program.

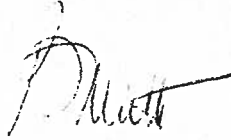
III. Conclusion

Due to the direct conflict with CWA requirements for the composition of boards or bodies that issue NPDES permits, Indiana must revise its NPDES program by: 1) amending the statute to eliminate the requirement that a member of the Board possess a permit (and Indiana must actually remove any such person from the Board), or 2) transferring the authority to issue general permits from the Board to the Indiana Department of Environmental Management. EPA strongly recommends that Indiana select the second option for resolving the conflict of interest within the State's NPDES program. We believe this option will be resource efficient for the State given the burdens associated with the process for adopting administrative rules. In addition, Indiana needs to revise its practice to limit the term of general permits to 5 years.

Please reply with a commitment and a plan to timely resolve the concerns expressed in this letter. Indiana could enact legislation to resolve the NPDES conflict of interest at the same time that it enacts legislation to resolve EPA's concerns, as expressed in a June 24, 2009 letter from this office to the Office of the Governor of Indiana

(enclosed), about Indiana's criminal enforcement authority. Do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'B. Mathur', with a long horizontal stroke extending to the right.

Bharat Mathur
Acting Regional Administrator

Enclosure

cc: Mr. Bruno Pigott, IDEM